

American Stores Properties Mill and its workers compensation insurance carrier, Kemper Insurance Co., (jointly referred to as “American”) ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Eblen's preliminary determination that T. M. L. is entitled to permanent total disability compensation under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

### **BACKGROUND AND ISSUE PRESENTED**

Mr. L. accidentally injured his lumbar spine while working for American on February 4, 1998, necessitating two subsequent spinal fusion surgeries and leaving Mr. L. with substantial permanent impairments. On May 2, 2002, Mr. L. filed an application with the Commission to compel American to pay permanent total disability compensation for Mr. L.'s injuries. Judge Eblen conducted an evidentiary hearing on the claim on July 9, 2003, and then, on December 22, 2003, issued her preliminary determination that Mr. L. was permanently and totally disabled.

American now requests Appeals Board review of Judge Eblen's decision. Specifically, American argues that Mr. L. has failed to satisfy §413's requirement that he “cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.”

### **FINDINGS OF FACT**

The Appeals Board affirms and adopts the findings of fact set forth in Judge Eblen's decision.

### **DISCUSSION AND CONCLUSIONS OF LAW**

There is no question that Mr. L. suffered accidental work-related injuries to his lumbar spine while working for American. His injuries are therefore generally compensable under § 34A-2- 401 of the Act. However, to qualify for permanent total disability compensation, Mr. L. must also satisfy each of the elements identified in § 34A-2-413(1) of the Act.

Judge Eblen has concluded that Mr. L. has met his burden of proof with respect to each of §413(1)'s elements. In challenging Judge Eblen's decision, American focuses on only one of those elements--the requirement found in §413(1)(c) that Mr. L. cannot perform other work reasonably available to him, considering his age, education, work experience, medical capacity and residual functional capacity.

The question of whether an individual can perform other work reasonably available is a fact-intensive question. The statute itself identifies a number of specific factors to be considered. Judge

Eblen's decision has identified the facts with respect to each of those elements and, after due consideration, has concluded Mr. L. cannot perform other work reasonably available to him. In challenging Judge Eblen's determination, American relies on conclusionary arguments without identified support in the record. This type of non-specific and unsubstantiated argument is of little assistance to the Appeals Board in evaluating the correctness of Judge Eblen's decision.

Based on the record in this matter, the Appeals Board concurs with and adopts Judge Eblen's application of §413(1) (c) to the facts of Mr. L.'s claim. Specifically, the Appeals Board concludes that no work is reasonably available to Mr. L. in light of his age, education, work experience, medical capacity and residual functional capacity. The Appeals Board therefore concurs with Judge Eblen's preliminary determination that Mr. L. is permanently and totally disabled.

### **ORDER**

The Appeals Board affirms Judge Eblen's decision and denies American's motion for review. The Appeals Board remands this matter to Judge Eblen for completion of the adjudicative process. It is so ordered.

Dated this 29<sup>th</sup> day of June, 2004.

Colleen S. Colton, Chair  
Patricia S. Drawe  
Joseph E. Hatch